DETAILED ACTION

Applicant's response of 10/1/07, to the outstanding restriction requirement is acknowledged. Applicant properly notes that the present application is a 371 National Stage Application, for which the Examiner misidentified. Thus, a corrected Supplemental Restriction Requirement is hereby required and sent.

As noted previously, the present application has been transferred from former Examiner Young to the present Examiner.

Based on claims, as well as amendments thereto, restriction is necessitated and proper (see MPEP 801, regarding restriction as necessary irrespective of the stage of prosecution/ examination).

Applicant's response to the previous restriction, on page 3, acknowledges that the proposed point of novelty is not the "oligopeptide" homopolymers (e.g. repeating amino acid/peptide), and that any known "oligopeptide" (or peptide for that matter) homopolymer may be used in the invention. (Note: spiral/helical configuration is a subject of protein folding, which any said homopolymer is inherently capable of forming depending on the conditions). Rather the wetting and/or penetrating agent (e.g. the elicitor within the composition) is the technical feature critical to the invention:

> The Official Action states that each composition, i.e. an elicitor, comprising a single oligopeptide, wetting agent, and penetrating agent is a distinct invention, and, thus, restriction to a single oligopeptide, wetting agent, and penetrating agent is required. *However, applicants respectfully submit that the claimed elicitor works with all oligopeptides* obtained by organic or enzymatic synthesis, that are homopolymers of amino-acids, *wetting agents used in agriculture, and penetrating agents used in agriculture.*

The above has been taken into consideration; however, is not found persuasive as the peptide in question is still deemed relevant and distinct as to the specific plant/pathogen to be targeted for treatment. And the entire description has been found to focus on these peptides, as opposed to the wetting/penetrating agents, for which no substantive description is found.

Furthermore, it is noted that the specification contains no examples of what of either genus of wetting or penetrating agents. Including for the elected "soya lecithin".

Additionally, even if support were found, it is noted that the art does not appear to label Applicant's previously elected wetting/penetrating agent "soya lecithin", as such, but rather as a dispersing agent, see Scheele (US 5,863,563) at col. 6-7:

> As will be appreciated by one of skill in the art, the pH-raising formulations described herein may contain components in addition to a pH-raising buffer compound and optional diluent. For example, the composition may also contain penetrating and surface wetting agents (e.g. alkylaryl polyether alcohols, including oxyethylated alkylphenolformaldehyde polymers), droplet stabilizing agents (e.g. glycerol, propylene glycol or similar polyhydroxy alcohol), antifoaming agents (e.g. silicone), **dispersing agents** (e.g. oleic acid, sorbitan trioleate, soya lecithin), propellants (trichloromonofluoromethane, dichlorodifluoromethane, dichlorotetrafluoroethane), flavoring agents and/or other agents which may be commonly used in the preparation of inhalable dry powder or aerosol medicaments. The pH-raising formulations of the subject invention may also contain respiratory therapeutic agents known in the art (e.g. artificial surfactants, antimicrobials, anti-inflammatory compounds, or nucleases). Alternatively, the method of treatment of the subject invention may be practiced in combination with respiratory therapies known in the art.

If soya lecithin is elected again, Applicant is asked to explain the above.

Supplemental Election/Restrictions

Restriction is required under 35 U.S.C. 121 and 372.

This application contains the following inventions or groups of inventions which are not so linked as to form a single general inventive concept under PCT Rule 13.1.

In accordance with 37 CFR 1.499, applicant is required, in reply to this action, to elect a single invention to which the claims must be restricted.

I. Claims 1-7 and 9-14, drawn to product/composition comprising any wetting agent or any penetrating agent used in agriculture, and a homopolymer oligopeptide, that may form spiral/helical structures.

II. Claim 15-21, drawn to a method for treating "any plant" comprising comprising a wetting agent or a penetrating agent used in agriculture, at and a homopolymer oligopeptide, that may form spiral/helical structures.

Lack of Unity

An international and a national stage application shall relate to one invention only or to a group of inventions so linked as to form a single general inventive concept ("requirement of unity of invention"). Where a group of inventions is claimed in an application, the requirement of unity of invention shall be fulfilled only when there is a technical relationship among those inventions involving one or more of the same or corresponding special technical features. The expression "special technical features" shall mean those technical features that define a contribution which each of the claimed inventions, considered as a whole, makes over the prior art. An international or a national stage application containing claims to different categories of invention will be considered to have unity of invention if the claims are drawn only to one of the following combinations of categories: (1) a product and a process specially adapted for the manufacture of said product; or (2) a product and a process of use of said product; or (3) a product, a process specially adapted for the manufacture of the said product, and a use of the said product; or (4) a process and an apparatus or means specifically designed for carrying out the said process; or (5) a product, a process specially adapted for the manufacture of the said product, and an apparatus or means specifically designed for carrying out the said process. If multiple products, processes of manufacture or uses are claimed, the first invention of the category first mentioned in the claims of the application and the first recited invention of each of the other categories related thereto will be considered as the main invention in the claims, see PCT Article 17(3)(a) and 1.476(c).

Technical Feature

For claims to have unity, the technical feature that runs through the inventions must be novel in order to impute "special" status thereto for which unity of the inventions may be held. Here, Applicant has argued, as noted above, that the technical feature is any wetting agent and/or penetrating agent, which may be administered with an oligopeptide (peptide), which is a homopolymer, capable of spiral/helical formation. Fretto (US 5,268,358) teach that wetting agents are known in the art, including in combination with oligopeptide homopolymers (col. 5; col. 10, lines 10-25):

> The peptides of interest will include at least about 5 but generally less than about 50 amino acids, preferably 8 to 20, and usually fewer than about 35 amino acids. In each instance, the oligopeptide will be as small as possible, while still maintaining substantially all of the desired activity, e.g., blocking activity. Although it may be preferable in some instances to utilize homopolymers of active oligopeptides, in other instances it may also be desirable to join two or more oligopeptides from the same domains or from different regions, which separately or together provide the desired activities. The peptides may, of course, be fused, bonded, mixed with, linked to, or conjugated or complexed with other proteins or molecules with desired activities (e.g., thrombolytic activity), preferably those having the same or a complementary range of biologic activities to obtain the benefits of the present invention.
>
> The pharmaceutical preparations according to the invention contain the customary inorganic or organic, solid or liquid pharmaceutically-acceptable carriers, optionally together with other therapeutically- or prophylactically-effective compounds and/or adjuncts, as mentioned above. Preferably used are solutions or suspensions of the active ingredient oligopeptides, especially isotonic aqueous solutions or suspensions, or also lyophilized preparations which are dissolved shortly before use. The pharmaceutical preparations may be sterilized and/or contain preservatives, stabilizers, wetting agents, emulsifiers, solubilizers, viscosity-increasing substances, salts for regulating the osmotic pressure and/or buffers, and also other proteins, for example, human serum albumin or human blood plasma preparations.

Thus, there being no "special" technical feature, the groups lack unity of invention.

Requirement for a Single Homopolymer Oligopeptide Election as the Invention of Either Group I or II

Note this section has been amended to also apply to Group I: Any homopolymer is a distinct compound, absent evidence to the contrary that a search of any oligopeptide and finding thereof, will also render any other oligopeptide an obvious variation. Absent such in writing, Applicant must identify a substantial, distinguishable, assertedly novel (otherwise the search once again turns on an individual peptide basis), core structure that runs through the oligopeptides, to allow for a coextensive search of more than one distinct oligopeptide (assumedly which imputes the same function upon ALL plants (as broadly claimed)). Absent such a showing in writing of such a structure and function in ALL plants, each oligopeptide is a distinct compounds which must be individually searched and examined upon it's own merits. Therefore, irrespective of whether Group I or II is elected as the invention, Applicant must elect a single oligopeptide as the invention, to which the elected Invention group will be searched. Alternatively, the Examiner is willing to search and examiner both of the distinct oligopeptides of claim 14, should Applicant so elect these two distinct peptide, as the invention. **This requirement is not to be taken as an election of species, but rather as an election of a single invention, since each compound is assumed to be a patentably distinct invention, in the absence of evidence to the contrary.**

Requirement for a Single Plant Election as to Group I or II Invention

Note this section has been amended as to also apply to Group I: As described above, the invention contains distinct oligopeptides peptides. Additionally, Applicant is claiming that ANY spiral, homopolymeric oligopeptide will work to treat ANY plant against pathogens. This Examiner finds this proposition somewhat unrealistic, as it is well known in the agricultural arts even that certain pesticides do not even work on all plants to treat all pathogens. Furthermore, and as relevant at this stage of examination, a search of ANY plant to see if ANY oligopeptide has been used thereon to treat in a fashion targeting ANY pathogen is grossly burdensome. Thus, if Group II is elected, Applicant must also elect a single plant (e.g. cereal, fruit, grape, lawn, horticulture plant, oil producing plant, soy, sunflower, melon, carrot, cauliflower, potato) as the plant of the invention, to which the single oligopeptide will be searched thereto. Absent an indication that any art found on said oligopeptide used on any plant for the stated purpose, will also render such use on any other plant an obvious variation therefrom. **This requirement is not to be taken as an election of species, but rather as an election of a single invention, since each compound is assumed to be a patentably distinct invention, in the absence of evidence to the contrary.**

Requirement for a Single Plant Pathogen Election as to Group I or II Invention

Note this section has been amended to Group I as well: As described above, the invention contains distinct oligopeptides peptides, distinct plants, and finally distinct pathogens to which are the ultimate treatment target of said oligopeptides applied to said distinct plant. Like the plant analysis, absent evidence to the contrary that ANY distinct oligopeptide applied to

ANY distinct plant is capable of treating ANY distinct pathogen thereon, and any art found thereto will also render any other pathogen treated as obvious thereto – Applicant must elect a single pathogen relevant to the single elected plant. A search of ANY plant and ANY potential pathogen that may infect ANY said plant being wholly burdensome. **This requirement is not to be taken as an election of species, but rather as an election of a single invention, since each compound is assumed to be a patentably distinct invention, in the absence of evidence to the contrary.**

Species Election

This application contains claims directed to the following patentably distinct species of the claimed invention:

1. A single wetting agent used in agriculture; or
2. A single penetrating agent used in agriculture; and

*It is noted; however, that no description was found as to any species of the either genus above, within the present specification.

The species are independent or distinct because a search for any of the above species is not necessarily co-extensive particularly with regard to the literature search and a reference, which would anticipate any one of the above species, would not necessarily anticipate or even make obvious another species, absent evidence to the contrary.

Applicant is required under 35 U.S.C. section 121 to elect a single disclosed species above for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held allowable. Currently, claim 1, 14, and 15 are generic.

Applicant is advised that a reply to this requirement must include an identification of the elected species consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon allowance of a generic claim, Applicant will be entitled to consideration of claims to additional species which are written in dependent form or otherwise include all the limitations of an allowed generic claim as provided by 37 CFR 1.141. If claims are added after the election, Applicant must indicate which are readable upon the elected species. MPEP section 809.02(a).

Should Applicant traverse on the ground that the species are not patentably distinct, Applicant should submit evidence or identify such evidence now of record showing the species to be obvious variants or clearly admit on the record that this is the case. In either instance, if Examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C. section 103(a) of the other invention.

Applicant is advised that the reply to this requirement to be complete must include an election of the invention to be examined even though the requirement be traversed (37 CRF 1.143).

Applicant is reminded that upon cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a petition under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

In re Ochiai/Brouwer Rejoinder

The examiner has required restriction between product and process claims. Where applicant elects claims directed to the product, and a product claim is subsequently found allowable, withdrawn process claims that depend from or otherwise include all the limitations of the allowable product claim will be rejoined in accordance with the provisions of MPEP § 821.04. **Process claims that depend from or otherwise include all the limitations of the patentable product** will be entered as a matter of right if the amendment is presented prior to final rejection or allowance, whichever is earlier. Amendments submitted after final rejection are governed by 37 CFR 1.116; amendments submitted after allowance are governed by 37 CFR 1.312.

In the event of rejoinder, the requirement for restriction between the product claims and the rejoined process claims will be withdrawn, and the rejoined process claims will be fully examined for patentability in accordance with 37 CFR 1.104. Thus, to be allowable, the rejoined claims must meet all criteria for patentability including the requirements of 35 U.S.C. 101, 102, 103, and 112. Until an elected product claim is found allowable, an otherwise proper restriction requirement between product claims and process claims may be maintained. Withdrawn process claims that are not commensurate in scope with an allowed product claim will not be rejoined. See "Guidance on Treatment of Product and Process Claims in light of *In re Ochiai, In re Brouwer* and 35 U.S.C. § 103(b)," 1184 O.G. 86 (March 26, 1996). Additionally, in order to retain the right to rejoinder in accordance with the above policy, Applicant is advised that the process claims should be amended during prosecution either to maintain dependency on the product claims or to otherwise include the limitations of the product claims. **Failure to do so may result in a loss of the right to rejoinder.**

Further, note that the prohibition against double patenting rejections of 35 U.S.C. 121 does not apply where the restriction requirement is withdrawn by the examiner before the patent issues. See MPEP § 804.01.

Conclusion

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MAURY AUDET whose telephone number is (571)272-0960. The examiner can normally be reached on M-Th. 7AM-5:30PM (10 Hrs.).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Cecilia Tsang can be reached on 571-272-0562. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

MA, 4/14/2008

/Maury Audet/
Examiner, Art Unit 1654